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No. 05-705

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In the Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether 47 U.S.C. §§ 206-207 create a private right of action for a provider of payphone services to sue a long-distance carrier for violations of the FCC's regulations concerning compensation for coinless phone calls.

RULE 29.6 STATEMENT

The corporate disclosure statement in respondent's brief in opposition remains accurate.

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STATEMENT

Petitioner Global Crossing is a long-distance or inter-exchange carrier (IXC), which is a type of common carrier. Respondent Metrophones is a payphone service provider (PSP). Metrophones sued Global Crossing in federal court for failure to pay compensation for completed payphone calls.

Under 47 U.S.C. §§ 206-207, every act by a common carrier that is in the Communications Act "declared to be unlawful" gives rise to an *express* private right of action for damages. Under 47 U.S.C. § 201(b), every "unjust or unreasonable" "practice" in connection with a communication service "is declared to be unlawful." Under 47 U.S.C. § 276(b)(1)(A)'s command to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones," the Federal Communications Commission (FCC) has lawfully imposed on common carriers, by regulation, the obligation to pay PSPs for the "dial-around" calls at issue in this case.

To reverse the Ninth Circuit and hold that Metrophones may not sue Global Crossing in federal court for unpaid dial-around compensation, this Court would have to conclude that it is either just and reasonable, or not a "practice," for a common carrier to flout Congress's fair-compensation command by violating the FCC's regulations that carry out that command. The Court would have to reach that conclusion, moreover, in the face of repeated statements to the contrary by the agency to which Congress has delegated authority to interpret the Act.

A. The Regulatory Framework Created By Congress

Before 1990, PSPs frequently sent all long-distance calls from their payphones to a single IXC, pursuant to exclusive contractual arrangements under which the IXC would bill the caller (or the called party) and remit compensation to the PSP for the use of its payphone. Congress ended such exclusive arrangements in 1990. It enacted legislation – the Telephone Operator Consumer Services Improvement Act of 1990

(TOCSIA), codified at 47 U.S.C. § 226 – that required PSPs to permit callers to use the services of *any* IXC, not just the IXC who had contracted with the PSP. See 47 U.S.C. § 226(c)(1)(B).

1. "Dial-around" calls (so named because a caller can "dial around" the IXC that has a contractual arrangement with the PSP, *e.g.*, by placing an "800" call to reach another IXC's network) enabled companies like Global Crossing to generate millions of dollars in revenue by providing calling-card and toll-free calling services that could be used from any payphone, but left PSPs largely uncompensated. See Pet. App. 3a-4a (describing industry history). Dial-around calls constituted a substantial portion of payphone usage when these cases were filed (JA 7), and the absence of compensation for such calls severely reduced PSPs' incentives to deploy and maintain payphones, threatening the public's access to a critical service.

In TOCSIA, Congress directed the FCC to "*consider* the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones" for certain dial-around calls. 47 U.S.C. § 226(e)(2) (emphasis added). The FCC ordered compensation for all calls it understood to be covered by the statute. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736 (1991) (First Report and Order); *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 F.C.C.R. 3251 (1992) (Second Report and Order).[1] The FCC stated that it was acting under the authority of Section 201, which requires that "charges, practices, classifications, and

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[1] The statement at Pet. Br. 22 that "the FCC *declined* to require compensation for most coinless calls" is untrue. The FCC took the position (which the D.C. Circuit later reversed) that subscriber 800 calls were not covered by the statute, but ordered compensation for all calls it believed were covered.

regulations for and in connection with" a common carrier's services must be "just and reasonable." See, *e.g.*, First Report and Order ¶ 59; Second Report and Order ¶ 66.

2. In practice, the TOCSIA regime did not ensure adequate compensation for PSPs. Not only had Congress merely directed the FCC to "consider" the problem, but also the FCC took the position that subscriber 800 calls were not covered by the statute at all. The D.C. Circuit remanded that issue for further consideration in *Florida Public Telecomm'ns Ass'n* v. *FCC*, 54 F.3d 857 (1995), and the matter was still pending on remand when Congress passed new legislation.

In 1996, Congress took forceful measures. No longer would it be enough for the FCC to "consider" the problem of dial-around compensation, and no longer would Congress leave any room for dispute about which dial-around calls were to be compensated. Rather, to "promote the widespread deployment of payphone services to the public," Congress directed the FCC to "take *all actions necessary* * * * to prescribe regulations that establish a per call compensation plan to *ensure* that all payphone service providers are fairly compensated for *each and every completed intrastate and interstate call* using their payphones." 47 U.S.C. § 276(b)(1)(A) (emphasis added).

The FCC developed such a plan and has modified it from time to time through a series of notice-and-comment rulemakings. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19,975, 19,977-19,983 ¶¶ 5-17 (2003) (*2003 Payphone Order*) (describing regulatory history). The FCC's compensation plans generally have required an IXC to pay compensation when it is the primary economic beneficiary of a call. See, *e.g.*, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 21,277 ¶ 83 (1996) (First Order).

In rulemakings under the 1996 Act, as in rulemakings under TOCSIA, the FCC identified Section 201 as one source of its authority to prescribe regulations. See, *e.g.*, First Order, 11 F.C.C.R. at 20,720 ¶ 364; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 F.C.C.R. 1778, 1845 ¶ 166 (1997); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 F.C.C.R. 2545, 2648 ¶ 232 (1999) (1999 Order). In the first rulemaking, the FCC requested comment on its tentative conclusion that it should exercise its jurisdiction under Section 201(b) "to ensure that PSPs are compensated for international as well as interstate and intrastate calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 6716, 6726 ¶ 18 (1996). After considering comments on that question, the FCC concluded that Section 201(b) provided statutory "authority * * * to ensure that PSPs are fairly compensated for international as well as interstate and intrastate calls." First Order, 11 F.C.C.R. at 20,569 ¶ 54.[2] Various IXCs, including petitioner Global Crossing and amici Sprint and AT&T, participated in this rulemaking. Some IXCs sought review of other aspects of the First Order, but none sought review of the FCC's assertion of Section 201(b) jurisdiction. Indeed, AT&T's comments endorsed the FCC's tentative conclusion. Comments of AT&T Corp. at 5 (July 1, 1996).

In its 1999 Order, the FCC decided that its per-call compensation rate would not include allowances to cover the bad-debt expenses that PSPs incurred when IXCs refused to pay the amounts they owed. 1999 Order, 14 F.C.C.R. at 2618-2620

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[2] The FCC also invoked its authority under Section 4(i),47 U.S.C. § 154(i), which authorizes the promulgation of rules that are "necessary in the execution of [the Commission's] functions."

¶¶ 160-162. PSPs challenged that decision in the D.C. Circuit. Several IXCs – including amici Sprint and AT&T – intervened to defend the FCC's decision. Relevant portions of their 1999 brief are attached as an Addendum. The IXCs argued that the FCC's decision to exclude bad-debt costs was reasonable because a carrier's "failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§206-08, 501-03." Final Joint Brief of Long Distance, Paging, and Consumer Intervenors in Support of Respondents at 15, *APCC* v. *FCC*, No. 99-1114 (filed Sept. 7, 1999), Addendum, *infra*, 5a.

The IXCs' 1999 assertion *necessarily* means that a failure to pay compensation violates *the Act* and that damage actions can be brought *in federal court* (and not merely in FCC proceedings). That is so because Section 206 establishes liability only for violations of "this Act," and Section 207 states that injured parties "may either make complaint to the Commission * * * or may bring suit * * * in * * * district court." Although Global Crossing asserted seven years later in *this* Court that it is a "fact" that "payphone service providers' right to bring claims to the FCC seeking to enforce FCC regulations derives from the FCC's powers described in 47 U.S.C. § 154(i), not from section 206 or 207" (Reply Br. in Support of Cert. 3 (Jan. 11, 2006)), the IXCs did not cite Section 154(i) – but did cite Sections 206-208 – to the D.C. Circuit.

The D.C. Circuit agreed that unpaid compensation could be recovered under Sections 206-208 and relied on that proposition in holding that the FCC's exclusion of bad-debt costs was reasonable. *American Public Communications Council* v. *FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (*APCC* v. *FCC*). The court devoted considerable attention to PSPs' remedies for unpaid debt, quoted the IXCs' brief, and noted that the FCC would be devoting still more attention to the issue (*ibid.*):

In upholding the reasonableness of the Commission's exclusion of the bad debt element from coinless call cost, we are mindful of the nature of the debt involved. As intervenor long distance carriers remind us, the "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties." *See* 47 U.S.C. §§ 206-08, 501-03 (1994). The plight of the allegedly uncompensated payphone service provider does not equate to that of a merchant pursuing deadbeat customers in the marketplace. Furthermore, for any harm that may be done to the PSPs, they are not left without remedy. After noting that it was "unable to generate a sufficient record on this question for issuing this Order," the FCC invited the parties to file petitions for clarification on the bad debt issue. Third Order, 14 F.C.C.R. 2545 ¶ 162, 1999 WL 49817. The RBOC Coalition has made such a filing; the Commission has received that petition; sought and received comments; and, is considering the issue. *See Common Carrier Bureau Seeks Comment on the RBOC/GTE/SNET Payphone Coalition Petition for Clarification Regarding Carrier Responsibility for Payphone Compensation Payment,* CC Docket No. 96-128, DA 99-730 (1999), *available at* 1999 WL 335783.

In a further notice of proposed rulemaking, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003). To address the bad-debt issue, the FCC sought, again, to determine the available remedies for nonpayment of required compensation. PSPs argued that IXCs should be required to pay for all calls (with a right to recover from switch-based resellers when appropriate) because PSPs had difficulty collecting from the switch-based resellers. AT&T, in re-

sponse, pointed to PSPs' right to obtain damages under Sections 206-208. Comments of AT&T Corp. at 19 (June 23, 2003).

The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement that Sections 206-208 provided a remedy to recover unpaid compensation. The FCC then stated, unequivocally, "A failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

The recognition in 2003 that a violation of the regulations could support a damages suit in federal court thus repeated a position that the FCC – *and IXCs* – had taken repeatedly starting in 1999, and was a direct response to the question asked in paragraph 19 of the 2003 further notice of proposed rulemaking. It is flatly untrue that the *2003 Payphone Order* "assert[ed] for the first time – and without any prior notice – that the regulations could * * * support damages suits in federal court." Pet. Br. 30.

B. The Proceedings Below

Despite the FCC rules, Global Crossing and other IXCs have failed to pay the required compensation for millions of calls, and PSPs have sought recovery in federal court. See, *e.g.*, JA 11-12, 15; *APCC Services, Inc.* v. *Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005), petition for cert filed, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766). When PSPs have invoked the remedies that IXCs assured the FCC would be effective, IXCs have argued that no such remedies exist.[3]

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[3] Sprint, for example, argued successfully in the D.C. Circuit in *APCC Services* – and now argues in its amicus brief in this Court – that a failure to comply with the FCC's payphone compensation *regulations* is not and cannot

1. In 2001, Metrophones brought separate lawsuits in the United States District Court for the Western District of Washington against several long-distance carriers, including Global Crossing, seeking an accounting and payment of unpaid compensation dating from the second quarter of 1999. After Global Crossing filed for bankruptcy, however, the court stayed Metrophones' case against Global Crossing.

In 2003, Metrophones filed a new complaint relating to payments that Global Crossing had failed to make since it had declared bankruptcy. JA 4-15. Metrophones alleged that Global Crossing had paid it, on average, only 10 cents per coinless call, well short of the 24-cent default rate established by FCC regulations, thereby accruing a deficit of $31,330.42. JA 15.

Metrophones' complaints at all times invoked the express private right of action in Section 206. *E.g.*, JA 12. A right of action exists under that section, however, only if a common carrier has violated some other section of the Communications Act. Metrophones initially cited Section 276 in both its 2001 and 2003 complaints as the provision Global Crossing had violated. In 2003, however, the Ninth Circuit held in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047, 1051, that PSPs have no right of action under Section 206 for violations of Section 276.

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be a violation of *the Act*, and that Sections 206-208 authorize actions only based on violations of *the Act*. Sprint Br. 11-12. Notably, if Sections 206-207 do not authorize a damages action in court for a violation of the payphone compensation regulations, Section 208 cannot possibly authorize a damages action *before the FCC* for such a violation either, since Section 208(a) requires an action "in contravention of" the Act and Section 207 makes clear that the matters for which damages may be pursued before the Commission and those for which damages may be pursued in court are the same, with the complainant having its option of forums. Yet the D.C. Circuit asserted without explanation in *APCC Services*, 418 F.3d at 1247, that "the question here is not so much whether there is a private right of action, but where – directly in district court, or in the Commission."

Metrophones moved to amend its complaint to assert violations of Sections 201(b), 407, and 416 of the Act, as well as certain state-law theories of recovery. JA 39-44, 55-56. Global Crossing moved to dismiss on the ground that *Greene* foreclosed Metrophones' Section 276 claim, and that the proposed amendments would be futile. The district court dismissed the Section 276 and 407 claims, but allowed Metrophones to proceed under Sections 201(b) and 416(c), as well as state law.

2. Global Crossing obtained permission under 28 U.S.C. § 1292(b) to appeal to the Ninth Circuit, which affirmed in part and reversed in part. The court began by noting (Pet. App. 6a-7a) that it had resolved the Section 276 question in *Greene*, so it confined its substantive discussion to the newly asserted theories under Section 201(b), Section 416(c), and state law.[4] Although it rejected Metrophones' Section 416(c) argument and certain of its state-law claims, the Ninth Circuit agreed with Metrophones (Pet. App. 8a-21a) that Global Crossing's failure to pay dial-around compensation violated Section 201(b)'s prohibition on "unjust or unreasonable" "practices * * * in connection with * * * communication service."

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[4] During oral argument, Metrophones twice made clear its disagreement with *Greene*, though it recognized that the Ninth's Circuit's views on Section 276 were, for the time, a *fait accompli*. See statements 19:35 and 30:00, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. Likewise, the FCC – which had not participated in *Greene* – filed an amicus brief in the Ninth Circuit stating (at 12 n.1) that it disagreed with *Greene*. The Ninth Circuit noted that Metrophones "ha[d] not appealed the dismissal of its claim under § 276." Pet. App. 9a n.4. Nevertheless, that court could have reached – and this Court can reach – the question whether Section 276 supports a private right of action under Section 206. See *Yamaha Motor Corp. U.S.A.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996) (appellate jurisdiction under Section 1292(b) applies to the entire district court order, and is not tied to the particular question formulated by the district court); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.35, at 444-445 (8th ed. 2002) (a prevailing party may defend a judgment on any ground properly raised below) (citing numerous supporting authorities); pp. 39-50, *infra*.

"Significant[]" to the Ninth Circuit's decision was that the FCC had embraced the same interpretation of Section 201(b), not only in paragraph 32 of its *2003 Payphone Order*, but also in an amicus brief filed in support of Metrophones. Pet. App. 9a, 13a. The Ninth Circuit reasoned that the FCC's views merited *Chevron* deference. Although the *2003 Payphone Order*'s statement regarding Section 201(b) was succinct, it "did not appear to have been made in anticipation of litigation" – to the contrary, it "arose in the context of a complex decision about the operation of the whole system of payphone regulation," and it was "apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system." Pet. App. 11a. "In short," the court said, it is obvious that "the Commission relied on the availability of actions for damages under §§ 206 and 207" when considering and crafting the *2003 Payphone Order*. Pet. App. 13a.

The Ninth Circuit also concluded that the FCC's amicus brief, filed in support of Metrophones, merited deference under *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). The court found "no reason to think that the interpretation" it contained was "not the 'fair and considered judgment'" of the FCC. Pet. App. 13a (quoting *Bank of Am.* v. *City & County of San Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002)). Finally, the court held that, although Section 276 preempted certain of Metrophones' state-law claims, it did not preempt its claims for *quantum meruit* and breach of implied contract. Pet. App. 24a-38a.

Global Crossing sought certiorari on two questions: (1) whether Section 201(b) "creates" a private right of action for violation of the FCC's dial-around compensation regulations; and (2) whether Section 276 preempts PSPs' state-law claims for *quantum meruit* and breach of implied contract. This Court granted certiorari on the first question. Properly phrased, however, the issue is *not* whether Section 201(b) "creates" a private

cause of action – no party or court has ever advanced that proposition in this litigation. Rather, the question is whether *Sections 206-207* give rise to a private cause of action for violation of the FCC's dial-around compensation rules, because a violation of those rules constitutes a violation of the Act.

SUMMARY OF ARGUMENT

I. Section 201(b) of the Communications Act provides that "any * * * charge [or] practice * * * that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). The Act's *express* private right of action allows damages in court whenever a common carrier "shall do * * * any act, matter, or thing in this chapter * * * declared to be unlawful." 47 U.S.C. § 206. Because in Section 201(b) all unjust or unreasonable practices are "declared to be unlawful" – the very language of Section 206 – *every* unjust or unreasonable practice by a common carrier gives rise to an *express* right of action. Congress, not a court or an agency, has created that capacious right of action.

In a notice-and-comment rulemaking, and at least two amicus briefs, the FCC has confirmed its agreement with the commonsense proposition that, because PSPs' ability to recover compensation for coinless calls is integral to the proper functioning of the payphone regulatory regime, an IXC's failure to pay that compensation is an "unjust or unreasonable" "practice" under Section 201(b). As the agency charged with administering the complex and evolving telecommunications regime established in the Communications Act, the FCC is entitled to *Chevron* deference for its well-considered interpretations of ambiguous statutory phrases. The Ninth Circuit therefore correctly held that an IXC's violation of Section 201(b), as interpreted by the FCC, gives rise to a private right of action in federal court.

A. Because the terms "unjust," "unreasonable," and "practice" in Section 201(b) are ambiguous with respect to an IXC's

failure to compensate a PSP, the Court should defer to the FCC's reasonable interpretation of those terms.

1.a. Section 201 governs the activities of common carriers in two contexts: (1) when they deal with end users of communications services; and (2) in their relationships with other telecommunications service providers, when each is providing a component of an integrated service offered to end users. Global Crossing proposes to limit the reach of Section 201, in the second context, only to a common carrier that is a "seller" of a component service dealing with a "customer." That reading of the statute is inconsistent with – not compelled by – the language of the statute. And it is inconsistent with authority holding that the statute governs such relationships, whether or not the common carrier acts as a "seller" of component services.

Global Crossing's construction of the "practice[s]" governed by Section 201 would produce arbitrary and irrational results. As Global Crossing emphasizes, PSPs are "sellers" and IXCs are "buyers" in the present context *only* because the FCC chose a compensation plan in which end users pay IXCs and IXCs pay PSPs. The formalistic characterization of PSPs as "suppliers" to IXCs does not change the substance of the relationship between them. Each provides an essential component of an integrated communications service.

Nor is there any reason to limit the reach of Section 201 to the kinds of "practices" that are described in carriers' tariffs. The FCC and the courts have long understood that other kinds of practices, including deceptive marketing practices, may be unjust or unreasonable practices that are forbidden by Section 201, even though such practices are not governed by tariffs.

b. There is no "jurisdictional mismatch" between Section 201, which governs "interstate or foreign" communication, and Section 276, which also governs intrastate communications. The "jurisdictional mismatch" argument was never made to the

courts below, and has therefore been forfeited. It is also wrong on its merits. The FCC's "interstate" authority under Section 201(a) extends even to intrastate service when there is more than a *de minimis* percentage of interstate traffic and it is difficult to sort out the interstate and intrastate services.

2. Because the language of Section 201(b) is ambiguous, courts owe *Chevron* deference to the FCC's reasonable construction of that section. The *2003 Payphone Order* resulted from a notice-and-comment rulemaking that focused on whether PSPs have adequate means to collect compensation from IXCs. The FCC's conclusion – that failure to pay just and fair compensation is unjust and unreasonable – is eminently reasonable in light of the fact that Congress added Section 276(b)(1)(A) to the Act in 1996 specifically "to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."

a. Deference to the *2003 Payphone Order* is not precluded merely because its reasoning affects a PSP's ability to pursue a remedy in federal court. There is no exception to *Chevron* for agency decisions that establish the presence of private rights of action. This is evident from analogy to cases in which Congress has delegated to an agency the power to make decisions carrying preemptive force, and the Court has deferred to the agency's exercise of its discretion. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982).

b. The brevity of the FCC's statement in the *2003 Payphone Order* does not preclude deference. The context of that statement makes clear that it incorporates prior understandings that a violation of the FCC's compensation rules violates the Act itself, thus suggesting violations of Sections 276 and 201(b). Given these precedents, the FCC's reasoning is clear without any lengthy exegesis.

What is more, in amicus briefs in both the Ninth and D.C. Circuits, the FCC explained the reasoning in the *2003 Payphone Order*. In *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997), the Court deferred to reasoning in an amicus brief after finding "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."

B. The FCC reasonably – and correctly – concluded that an IXC's violation of the FCC's payphone rules constitutes an "unjust or unreasonable" practice under Section 201(b). There is nothing just and reasonable about refusing to pay a valid debt.

II. Beyond Section 201(b), Global Crossing's violation of the payphone rules also violates Section 276(b)(1)(A), which is designed "to ensure that all payphone service providers are fairly compensated for each and every completed * * * call using their payphone." As the Court has explained, "it is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001). Because the FCC's payphone rules authoritatively interpret Section 276 by providing such details as the party responsible for compensating PSPs, a violation of those rules is a violation of the Act and gives rise to a right of action under Section 206.

The payphone rules do not "go beyond" Section 276 simply because they provide details that the statute does not. The point of delegation is to allow agencies to use their expertise to elucidate general legislative dictates, and Congress's purpose in instructing the FCC "to establish a per call compensation plan" to compensate PSPs was to allow the FCC to provide those details.

There is no need to conduct a *Sandoval*-type analysis of Section 276 to determine whether it contains rights-creating language. *Sandoval* is an *implied*-right-of-action case that says

nothing to foreclose an *express* right of action. If a *Sandoval*-type analysis were appropriate here, however, it would be pellucidly obvious – the Ninth and D.C. Circuits to the contrary notwithstanding – that Section 276 contains rights-creating language. Section 276 was enacted for the benefit of PSPs, enhancing the prior TOCSIA regime that had not been sufficient to assure adequate compensation to PSPs. Section 276 also speaks in terms of the party benefited – the PSPs – rather than the party ordered to pay, a clear signal of congressional intent to create rights. And the phrasing of Section 276 in strong words of entitlement – the FCC "*shall* take *all actions necessary* * * * to establish a per call compensation plan *to ensure* that *all* payphone service providers are fairly compensated for *each and every* completed * * * call" – confirms that Congress intended PSPs to have enforceable rights.

ARGUMENT

Global Crossing's failure to compensate PSPs for coinless calls violated the FCC's payphone rules, which have been upheld (in decisions not challenged here) as creating a just and fair compensatory regime. That failure to pay fair compensation constitutes an "unjust or unreasonable" "practice" under Section 201(b), as the FCC has determined repeatedly. Global Crossing's rules violation also constitutes a violation of Section 276(b)(1)(A) itself, because the payphone rules authoritatively interpret the statute. Sections 206-207 provide an express right of action for each of those statutory violations.

I. Global Crossing's Failure To Pay Dial-Around Compensation Constitutes An Unjust Or Unreasonable Practice Under Section 201(b), And Is Therefore Actionable In Federal Court Under Sections 206-207

Global Crossing is a "common carrier." When it carries dial-around calls from payphones, it is providing a "communication service" described in Section 201(a). Its refusal to com-

pensate PSPs for such calls, as required by law, is an "unjust or unreasonable" "practice" "in connection with" the offering of that "communication service." 47 U.S.C. § 201(b).

Nevertheless, Global Crossing's brief begins – as early as the Question Presented page – by asking the wrong question, one that then infects its entire analysis of Section 201(b). The issue is not, as Global Crossing would have it, whether *"§ 201(b)* of the Communications Act of 1934 *creates* a private right of action" for violations of the FCC's dial-around compensation rules. Pet. Br. (i) (emphasis added); *id.* at 9 (same). No party to this litigation has ever suggested that Section 201(b) creates a private right, and the Ninth Circuit did not so hold. Rather, the question is whether the express right in *Sections 206-207* enables a PSP to sue an IXC for violating the payphone compensation rules, on the theory that such failure to pay is an "unjust or unreasonable" "practice" under Section 201(b).

Permeating Global Crossing's brief is the suggestion that it is not plausible that Congress intended, in Section 201(b) alone, to create a private right of action for violation of the FCC's payphone compensation rules. *E.g.*, Pet. Br. 11. But Congress – through unambiguous statutory *text* – has declared that *all* unjust or unreasonable practices by common carriers violate the Act, and that there is a private right of action for any violations of the Act by common carriers. Global Crossing conceded that point in oral argument before the Ninth Circuit: "If there is a violation of 201(b), * * * I would agree that would supply the basis for a private damages remedy." Statement at 37:23, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. There is a violation of Section 201(b) – and therefore a cause of action under Section 206 – whenever there is an unjust or unreasonable practice, and there is no need for further evidence of congressional intent to create a cause of action beyond the text of Section 206.

A. Because The Terms "Unjust," "Unreasonable," and "Practice" Are Both Broad and Ambiguous, *Chevron* Deference Is Owed To The FCC's Authoritative Interpretation Of The Statute

As this Court said in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services, Inc.*, 125 S. Ct. 2688, 2699 (2005), "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Thus, the Court must first ask whether the text of Section 201(b) is ambiguous as to whether it encompasses violations of the FCC's payphone compensation rules. If so, and the FCC's authoritative interpretation of that Section is reasonable, the interpretation must be upheld. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). And that is so "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 125 S. Ct. at 2699.

1. The Text and Structure of Section 201(b) Do Not Unambiguously Resolve Its Applicability To A Carrier's Violation Of The FCC's Payphone Rules

The Ninth Circuit was correct that the text of Section 201(b) itself does not clearly resolve whether it encompasses violations of the FCC's payphone compensation rules. "The terms 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms." *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). The term "practice" – which is commonly defined as "a repeated or customary action" (WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 1780 (3d ed. 1986)) – is similarly broad, and certainly capable of encompassing Global Crossing's violations of the payphone compensation rules. We address the term "practice" first, and then the question – which is not difficult or complex – whether the

FCC had room to declare it "unjust or unreasonable" for an IXC to accept services without paying for them.

a. Section 201(b) is not limited to carriers' relationships with their customers

Section 201 governs the activities of common carriers in two contexts. *First*, it regulates common carriers' dealings with end users of communications services by, among other things, requiring just and reasonable charges for such services. *Second*, it regulates common carriers' dealings with other telecommunications service providers (including but not limited to other common carriers) when each party in that relationship provides an essential component of a communications service. It governs, for example, a common carrier's practices concerning "physical connections with other carriers," the establishment of "through routes and charges applicable thereto," and "the divisions of such charges." 47 U.S.C. § 201(a).

Global Crossing proposes to limit the reach of Section 201 so that it would apply in the *second* context only to common carriers that "sell" one component of a communications service to another party, which uses that component, in conjunction with others, to serve end users. Under that interpretation, Section 201 would not apply to the practices of common carriers that "buy" a component of the service and sell it to end users.

But no court has ever accepted Global Crossing's proposed limitation of the phrase "practice * * * in connection with * * * communications service" to encompass *only* a carrier's relationship with its customers.[5] Nothing in the language of the statute

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[5] This Court has rejected, in a different context, the argument that "the words 'charges,' 'classifications,' 'practices,' and 'regulations' appear throughout the Act in contexts where it is clear that what is meant is charges which relate directly to carriers' rate and service relationships with their customers," and that those terms must always be *limited* to such relationships. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 371 (1986).

suggests, let alone requires, such a limitation, and Global Crossing cites no authority supporting that limitation – all authority is to the contrary. Section 201 has been applied to a number of dealings between a common carrier and parties that are *not* the common carrier's customers.[6]

Section 201 has been applied, for example, to govern the "sale" of access services by local exchange carriers to IXCs. See, *e.g.*, *MCI Telecomms. Corp.* v. *FCC*, 59 F.3d 1407, 1414 (1995) (Section 201(b) makes unlawful a carrier's violation of agency regulations setting maximum rate of return for interstate access services provided to another carrier). But it has also been applied to govern an IXC's refusal to pay for access services it "purchased" from a local exchange carrier. See, *e.g.*, *MGC Communications, Inc.* v. *AT&T Corp.*, 14 F.C.C.R. 11,647, 11,659 (1999) (applying Section 201(b) when AT&T refused to pay for access services it had ordered from a local exchange carrier); see also *Ascom Comm'ns, Inc.* v. *Sprint Comm'ns Co.*, 15 F.C.C.R. 3223 (2000) (Section 201(b) makes unlawful a carrier's attempt to collect from a PSP for unauthorized and fraudulent calls placed from a PSP's phones over a carrier's network).[7]

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[6] Some of the non-customers to which Section 201 has been applied are themselves common carriers, but it is not necessary in this case to consider whether PSPs are common carriers. The sole point is that Section 201 applies to a broader swath of relationships than common carriers' dealings with their customers – the limitation Global Crossing proposes.

[7] Although the FCC in subsequent cases has identified compensation disputes between carriers that it will not declare to involve unjust or unreasonable practices (see *U.S. Telepacific Corp.* v. *Tel-America of Salt Lake City, Inc.*, 19 F.C.C.R. 24,552 (2004); *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004)), it has never retreated from the proposition that the term "practices" can encompass a carrier's dealings with other service providers, including a carrier's failure to pay compensation in some settings, and that "practices" are not limited to a carrier's dealings with its customers.

The words "practice" "in connection with" a service suggest, if they do not compel, a broader scope, to encompass a carrier's practices when it deals with other parties such as PSPs whose services are an integral component of the service the carrier provides to its customers. That broader reading of Section 201(b) is both natural and necessary to effectuate the second clause of Section 201(a), which authorizes the Commission to require physical connections between carriers and through routes, the "charges applicable thereto and the divisions of such charges." If Global Crossing's reading of Section 201(b) were correct, limiting that subsection's reach to a carrier's dealings with its customers, Section 201(b) could *not* be invoked to enforce the Commission's orders or to regulate carriers' "practices in connection with" the division of charges among carriers referenced in Section 201(a). Nothing suggests that Section 201(b) was meant to effectuate the first clause of Section 201(a) but not the second; indeed, the FCC has long understood that Section 201(b) applies to the enforcement of physical connection orders among carriers under Section 201(a). See *MTS and WATS Market Structure, Phase III, Establishment of Physical Connections and Through Routes Among Carriers*, Notice of Proposed Rulemaking, 94 F.C.C.2d 292 (1983) ("Section 201(b) * * * requires all carrier practices relating to the * * * establishment of physical connections and through routes to be just and reasonable."). And both clauses of Section 201(a) must be given effect. That is why the D.C. Circuit held that the Commission could not rely on the first clause in Section 201(a) to impose an obligation on AT&T to accept access services; such an obligation must arise from the second clause in that section, which can be invoked only after an opportunity for a hearing. *AT&T Corp.* v. *FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002).

Global Crossing's strained interpretation of the statutory language would introduce arbitrary and irrational results because the question whether a telecommunications service provider is a "buyer" or a "seller" in this context has nothing to do

with the reasons for regulating (or not) that provider's practices. In this case, as Global Crossing emphasizes, PSPs appear to be "sellers" and IXCs appear to be "buyers" only because the FCC designed its compensation plan to permit IXCs to collect compensation from end users for the use of a payphone and to remit that compensation to PSPs. Regulation of dial-around services could just as easily have developed in a manner that allowed PSPs to collect the money in the first instance, a point Global Crossing emphasizes. See Pet. Br. 23 ("The FCC's regulations would be perfectly valid if they required callers, instead of carriers, to compensate payphone service providers for coinless calls."). If PSPs collected payments from customers, no money would flow to them from IXCs. The fact that money does flow from IXCs to PSPs creates the *illusion* that PSPs are "selling" a service to carriers, but in truth each party – the PSP and the IXC – provides a service to the caller, for which each is supposed to be compensated. There is no "buyer" or "seller," merely a collection arrangement as part of the integrated offering of a telecommunications service by multiple parties.

When the components of a service are provided by multiple parties, there is no reason to suppose that Congress intended a carrier's statutory obligation to act justly and reasonably to depend on the form of the relationship between the parties, rather than its economic substance – especially when nothing in the statutory language requires that approach. Indeed, Global Crossing's invitation to adopt such a formalistic approach could wreak havoc far beyond the context of payphone disputes and undermine Congress's fundamental objective of promoting competition in the telecommunications industry. In contrast to the bygone world of Ma Bell, when a single carrier handled most communications from one end to the other, a competitive telecommunications market requires myriad interconnections among different carriers, as well as efficient inter-carrier compensation arrangements in the common situation in which only one of those parties has a direct billing relationship with the end

user. Global Crossing's construction would place such matters beyond the reach of Section 201(b).

Nor is there any reason to construe the term "practices" to encompass only those practices that may be described in tariffs. The FCC has long construed Section 201(b)'s prohibition on "unjust or unreasonable * * * practices" to reach common carriers' fraudulent or misleading advertising practices, even though those practices are neither governed by filed tariffs, nor directed to the carrier's existing customers. In 1992, the FCC admonished AT&T for "confusing or misleading" marketing practices and "caution[ed] AT&T that further actions of the nature described herein may result in a finding that Section 201(b) has been violated." *Letter of Admonishment*, 7 F.C.C.R. 7529, 7530 (1992). Six years later, the FCC found that another carrier's telemarketing practices were unjust and unreasonable under Section 201(b). *Business Discount Plan, Inc.*, 14 F.C.C.R. 340, 355 (1998). Most recently, the FCC issued a joint policy statement with the Federal Trade Commission, which reiterated that "unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b)." *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, 15 F.C.C.R. 8654, 8655 (2000). This established understanding that Section 201(b) applies to common carriers' misleading marketing statements made to non-customers is a natural application of the phrase "unjust or unreasonable" "practice," but it cannot be reconciled with Global Crossing's proposed limitation.[8]

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[8] Courts have reached the same conclusion as the FCC. See *In re Long Distance Telecomms. Litigation*, 831 F.2d 627, 628-632 (6th Cir. 1987) (accepting district court's conclusion that IXCs' failure to disclose their billing policies was within the scope of activities governed by Section 201(b) and affirming primary-jurisdiction referral of the question of reasonableness to the FCC); *In re Wireless Telephone Federal Cost Recovery Fees*

b. There is no "jurisdictional mismatch" between Sections 201(b) and 276

This Court should not entertain Global Crossing's and its amici's newly fashioned claim that there is a "jurisdictional mismatch" between Section 201, which governs "interstate or foreign" communication, and Section 276, which also includes intrastate communication. Pet Br. 37; AT&T Br. 13-14. Although Global Crossing, AT&T, Sprint, and other IXCs were parties to the rulemaking proceedings that led to the *2003 Payphone Order*, no IXC challenged that order in a court of appeals under the Hobbs Act, 28 U.S.C. § 158, the proper procedural vehicle for a "jurisdictional mismatch" argument against the FCC's conclusion that Section 201(b) applies to an IXC's failure to compensate a PSP. What is more, although IXCs' failures to compensate PSPs have been fully litigated through two different federal courts of appeals, until now no party has ever suggested that a federal court determine the relative jurisdiction-

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Litigation, 2004 WL 3671053, at *16 (W.D. Mo. Apr. 20, 2004) (defendant's argument that "Section 201(b) does not provide a cause of action for deceptive advertising or billing practices * * * has no merit"). Despite some loose language, cases such as *Pinney* v. *Nokia, Inc.*, 402 F.3d 430 (4th Cir.) ("A 'practice in connection with' wireless service does not * * * include tortious conduct such as deceptive advertising and billing by wireless service providers in the provision of wireless telephone service") (citing *Marcus* v. *AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)), cert. denied, 126 S. Ct. 551 (2005); *Gilmore* v. *Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916 (N.D. Ill. 2001); and *In re Wireless Radio*, 327 F. Supp. 2d 554 (D.D.C. 2004), are not to the contrary. In those cases, plaintiffs alleged fraudulent and misleading advertising practices under state law, and defendants attempted to remove the cases to federal court on the theory that the Communications Act completely preempts those state-law claims. These courts merely decided that the Communications Act was not so clearly preemptive as to overcome the appropriate reluctance to "find that extraordinary pre-emptive power * * * that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 66 (1987).

al scopes of those sections. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no material "mismatch" between the two sections. In *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 376 n.4 (1986), this Court stated that the FCC may regulate intrastate communications when the communications have interstate components and where it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." See also *Public Serv. Comm'n of Md.* v. *FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (FCC regulation of jurisdictionally mixed communications is permissible if it is necessary to protect valid federal regulatory objective and it is not feasible to unbundle intrastate and interstate components). Under these precedents, the FCC has asserted authority over jurisdictionally mixed communication services. *E.g.*, *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 F.C.C.R. 6166, 6180 (1991) (record established that "neither the local exchange carriers, interexchange carriers, nor information providers will know whether the call is intrastate and thus within the state's jurisdiction"), aff'd on reconsideration, 8 F.C.C.R. 2343 (1993) (regulating jurisdictionally mixed traffic "after finding that the traffic to a single 900 number could not be jurisdictionally sorted").

The FCC has interpreted federal authority over jurisdictionally mixed communications to extend to communications involving more than a *de minimis* interstate component. See *GTE Telephone Operating Cos.*, 13 F.C.C.R. 22,466, 22,479 (1996) (ADSL service qualifies as "interstate" for purposes of Section 201 because more than a trivial amount of ADSL communication is interstate); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 F.C.C.R. 15435 (2001) (applying *de minimis* approach with regard to a cross-connect service between collocators and other carriers provided pursuant to Section 201). In practice, the

de minimis threshold has required only that the interstate component constitute at least 10% of the overall call volume. *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 F.C.C.R. 5660 (1989) (establishing 10% test); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 F.C.C.R.. 22,404, 22,422 n.106 (2004) (citing *MTS and WATS* approach with approval). The 10% approach to jurisdictionally mixed communications has been judicially approved. *E.g., Qwest Corp.* v. *Scott*, 380 F.3d 367 (8th Cir. 2004).

Thus, the "interstate and foreign" language in Section 201(a) has never been construed as rigidly as Global Crossing suggests; instead, federal jurisdiction has been extended pragmatically to jurisdictionally mixed communications where there is a substantial interstate component and it is not feasible to segregate intrastate and interstate traffic. Significantly, Section 201 authorizes the FCC to regulate these jurisdictionally mixed services even when the intrastate component of the service, if it could practicably be segregated, would be expressly reserved for state regulation (and expressly beyond the reach of FCC regulation) pursuant to 47 U.S.C. § 152(b). For payphone calls, unlike other kinds of communications, Congress has unequivocally rejected any sphere of state autonomy. It has declared that the FCC must ensure payphone compensation for both intrastate and interstate calls, and has authorized the FCC to preempt any state regulation that interferes with that objective. 47 U.S.C. § 276(c). In light of this fact, there should be no presumption in favor of a narrow reading of the FCC's jurisdiction under Section 201 over mixed intrastate/interstate payphone services; rather, there should be a presumption in favor of a broad reading of that jurisdiction.

There is thus no necessary "mismatch" between Sections 201 and 276, particularly for dial-around traffic, which by

its very nature is overwhelmingly long-distance and substantially interstate; for local calls, people simply use coins.[9] What is more, it is tremendously complicated, if not practically impossible, to segregate interstate and intrastate dial-around traffic. In the round of rulemaking the led to the *2003 Payphone Order*, Global Crossing's comments stressed the difficulty of tracking any one payphone call (let alone keeping records of millions of them to separate intrastate from interstate calls). See Comments of Global Crossing North America, Inc., at 2 (June 23, 2003) ("The basic issue that the Commission needs to confront is the complexity of tracking a payphone-originated call to completion in a multiple-carrier environment."); *id.* at 3 ("in a multiple-carrier environment, there is no single entity that can track a call from origination to completion"); *id.* at 4 ("there is no single party that is capable of tracking a call from origination to completion").

Because it is very difficult for PSPs to distinguish interstate from intrastate dial-around calls, requiring them to guess the proper jurisdiction for recovery of dial-around compensation would plainly frustrate Congress's objective "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). Given these difficulties, it is entirely natural that both Congress and the FCC would have thought Section 201(b)'s language to extend to all dial-around payphone traffic.

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[9] Even for calls made using prepaid calling cards, which logically are more likely than other types of dial-around calls to be intrastate, the FCC just last month adopted "a default presumption that" only "50 percent of traffic is jurisdictionally intrastate," rejecting a proposal to presume that 80 percent of traffic is jurisdictionally intrastate. *Regulation of Prepaid Calling Services*, Declaratory Ruling and Report and Order, FCC 06-79, 2006 WL 1826190, at *11 ¶ 36 (released June 30, 2006).

To the extent that the record in this case does not contain a discussion of the precise composition of dial-around traffic and the administrative difficulties involved in segregating it, that is the direct result of Global Crossing's (and other IXCs') failure either to challenge the *2003 Payphone Order* under the Hobbs Act, or to raise this issue at any time during the years of litigation in the lower courts, when such factual development would have been available. Petitioner and its amici should not be permitted to eschew their administrative remedies and abstain from making available arguments below, only then to sandbag respondent and this Court with an argument that implicates facts not contained in the record.

Finally, if the issue had been preserved and the scope of Section 201(b) were not broad enough to reach *all* dial-around calls (intrastate as well as interstate), the proper solution would not be to invalidate, for "jurisdictional mismatch," an otherwise-valid FCC interpretation of Section 201(b). The solution would be to limit the reach of the Section 206 damages action based on Section 201(b) to interstate calls only. Because the Ninth Circuit held that there is a Section 206 damages action for *all* violations of the regulations (and did not carve out intrastate calls, in part because no one asked it to do so), any interpretation of Section 201(b) that limited its reach to interstate calls would require consideration of whether the Ninth Circuit's judgment could be affirmed in its entirety on alternate grounds. Because it is clear that the Ninth Circuit's *Greene* decision was wrong, and that this Court may reach the issue, it would be appropriate to affirm on the basis that a violation of the regulations, with respect to *either* interstate or intrastate calls, is a violation of Section 276 and actionable under Section 206. See pp. 39-50, *infra*.

2. *Chevron* Deference Is Due To The FCC's Permissible Construction Of The Ambiguous Language In Section 201(b)

Given the statutory ambiguities, deference is warranted to the FCC's authoritative and reasonable interpretation of Section 201(b), as set forth in the *2003 Payphone Order*. Indeed, the order is so plainly dispositive that the D.C. Circuit was able to hold that an IXC's violation of the payphone rules does not violate Section 201(b) only by *failing even to mention it*. See *APCC Services*, 418 F.3d at 1254 (Ginsburg, C.J., dissenting). Not surprisingly, Global Crossing makes no attempt to defend the reasoning of the *APCC Services* majority.[10]

The *2003 Payphone Order* is plainly an authoritative interpretation of the sort that warrants *Chevron* deference, issued as it was after full notice-and-comment rulemaking proceedings. Throughout the rulemaking proceedings leading up to it, the

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[10] The panel majority's reasoning in *APCC Services* is indefensible for additional reasons. The *only* question under Section 201(b) is whether failure to comply with the FCC's dial-around compensation rules is an unjust or unreasonable practice. Yet the D.C. Circuit's opinion never actually answered that question. Instead of holding that such a failure is "just" and "reasonable" – as it would have to be for there *not* to be a private right of action under Congress's express words – the D.C. Circuit focused on the different question whether the FCC *has declared* the practice to be unjust or unreasonable. The answer to *that* question is indisputably yes, but the D.C. Circuit somehow answered it no. It never reached the underlying *statutory* question whether an IXC's failure to pay *is* an unjust or unreasonable practice. In effect, the D.C. Circuit held that every common carrier practice – no matter how unjust, no matter how unreasonable – complies with Section 201(b) unless and until the FCC says otherwise. See 418 F.3d at 1248 ("We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here."). This Court, however, has rejected the argument that a rate or practice does not become unreasonable until an administrative agency so declares. *Reiter* v. *Cooper*, 507 U.S. 258, 267-268 (1993).

existence of PSPs' private remedies against IXCs was central to the FCC's thinking; in fact, the FCC's focus on that issue was largely caused by *the IXCs'* insistence that such remedies were available. See pages 4-5, *supra*. The court of appeals agreed that compensation could be recovered under Sections 206-208 – quoting the IXCs' brief on the point – and relied on that fact in holding that the FCC's exclusion of bad-debt costs was reasonable. *APCC* v. *FCC*, 215 F.3d at 56.

Then, in the 2003 NPRM, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." 18 F.C.C.R. at 11,012 ¶ 19. AT&T, in response, pointed to PSPs' right to recover damages under Sections 206-208 and argued that PSPs "should use those remedies rather than simply shift the collection problem to someone else." Comments of AT&T Corp. at 19 (June 23, 2003). The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement (*APCC*, 215 F.3d at 56) that Sections 206-208 provide a remedy to recover unpaid compensation. The FCC explained that "[a] failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

Given that a PSP's ability to pursue remedies against IXCs was central to the complex regulatory regime that the FCC established in its payphone rules, the FCC's conclusion that an IXC's regular violation of those rules "constitutes * * * an unjust or unreasonable practice" is more than reasonable. Indeed, the rules were promulgated under Section 276, which Congress enacted "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones." And there is no question that the FCC's payphone rules, which are intended to ensure that just

compensation, establish a just and fair regime. See *APCC*, 215 F.3d at 52 (upholding rules). As Chief Judge Ginsburg put it, "[o]ne would * * * be hard-pressed to say the Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." *APCC*, 418 F.3d at 1255 (Ginsburg, C.J., dissenting).

Despite the *2003 Payphone Order*'s authoritative statement of the FCC's position on a question it clearly considered, Global Crossing offers three reasons why this Court should not defer to it. *First*, Global Crossing asserts that the order "is centrally concerned with providing a [federal] remedy," and argues that deference should not be afforded when an agency speaks on matters of federal jurisdiction. Pet. Br. 30-32 *Second*, it suggests that deference is not due because the order does not contain a sufficient exegesis of the reasoning behind the FCC's conclusion. *Id.* at 33-34. *Third*, it suggests that it is an unreasonable interpretation of Section 201(b). *Id.* at 35-41. None of those arguments withstands scrutiny.

a. The FCC's interpretation of the terms in Section 201(b) is not precluded from receiving *Chevron* deference merely because it has implications for rights of action

It is difficult to make sense of Global Crossing's argument that deference is not due to the FCC's statement because it is "centrally concerned with providing a remedy." Pet. Br. 30.[11]

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[11] The D.C. Circuit agreed with Global Crossing, stating – without citation of authority – that, "[g]iven the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency." *APCC Services*, 418 F.3d at 1248. That proposition was so indefensible that AT&T and Sprint disavowed it in the very first paragraph of their response to the PSPs' rehearing petition. "In their petition, Appellees ('APCC') wrongly charge that the panel devised a new test * * * for assessing whether an agency interpretation of a statute warrants deference under *Chevron* * * * – namely, whether the interpretation has

Congress, not the FCC, created the express right of action in Sections 206-207 to remedy violations of the Act, and Congress likewise chose to delegate interpretive authority to the FCC by including the broad and ambiguous terms "unjust," "unreasonable," and "practice" in Section 201(b). It cannot be that an agency's interpretation of ambiguous statutory language receives no deference merely because Congress elsewhere provided that statutory violations give rise to private rights of action.

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990), certainly does not stand for the proposition that courts should not defer to agencies' views on questions that affect private rights of action. But see Pet. Br. 31. There, the statute included an express right of action that was silent as to whether it preempted state-law remedies. The Department of Labor issued a regulation interpreting the "gap" in the statute to mean that the federal remedies were exclusive, but the Court did not defer to its interpretation because it held that there was in fact no statutory gap, *i.e.*, that Congress intended no delegation. 494 U.S. at 650. That case has no implications for the dispute over Section 201(b), where Congress *did* create statutory gaps that signal delegation to the FCC. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 501-502 (2002) (deferring to FCC's construction of what is "just and reasonable"); *Brand X*, 125 S. Ct. at 2699 (citing Section 201(b) in support of holding that "[t]he *Chevron* framework governs our review of the Commission's construction").

When Congress has delegated to an administrative agency the general authority to make rules that carry preemptive force, and litigants have challenged the resulting regulations on the ground that Congress did not itself specify the preemptive federal rule, this Court has rejected the challenges. "[A] narrow fo-

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'consequences to judicial dockets.' Pet. 2. The panel adopted no such test." Appellants' Opposition to Appellees' Petition for Rehearing and Rehearing *En Banc* at 1, No. 04-7034 (D.C. Cir.) (filed Sept. 20, 2005).

cus on Congress' intent to supersede state law [is] misdirected." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982). Instead, the question is whether the regulation "is within the scope of the [agency's] delegated authority." *Ibid.*

Nor does Global Crossing's narrower theory – that this *particular* interpretation is not deference-worthy because it was improperly motivated – fare any better. As a factual matter, Global Crossing's revisionist history suggesting that the *2003 Payphone Order* "implicitly responded" to the Ninth Circuit's holding in *Greene* (Pet. Br. 30) is unfounded: the Ninth Circuit decided *Greene* on August 25, 2003, but the NPRM that gave rise to the *2003 Payphone Order* was issued months before, on May 28, 2003. As explained in detail above, that NPRM was centrally concerned with "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated" (18 F.C.C.R. at 11,012 ¶ 19), a question that naturally implicated the availability of private rights of action.

The "motives" argument also fails for a more fundamental reason. Whether an agency's interpretation "responds" to a court decision has no bearing on whether the interpretation is permissible under *Chevron*. It is entirely possible for an agency to exercise its discretion reasonably in response to a decision with which it disagrees (see *Brand X*, 125 S. Ct. at 2700-2702), or to include a statement reacting to a recent development after the agency's position has been formed internally. The Ninth Circuit deferred decision in this case until this Court had decided *Brand X* (see JA 3), and then recognized that *Brand X* left "no doubt that *Greene* does not prevent us from affording deference to the FCC's interpretation of § 201(b)" (Pet. App. 10a). Yet Global Crossing invites *this* Court to make the same error for which the Ninth Circuit was reversed in *Brand X*, by failing to defer to an FCC interpretation just because it supposedly responded to a decision with which the FCC disagreed.

b. The brevity of the FCC's statement does not preclude *Chevron* deference

In its *2003 Payphone Order*, the FCC reasoned that, because switch-based resellers were the "primary economic beneficiaries" of coinless calls, it was most efficient for them to compensate PSPs. 18 F.C.C.R. at 19,990 ¶ 28.[12] The PSPs, however, had vigorously opposed that outcome because of their lack of leverage to collect on bad debts. Speaking to that concern, the FCC reassured the PSPs that "the D.C. Circuit, in upholding the reasonableness of the Commission's decision in *APCC v. FCC*, found that the PSPs had remedies to recover this debt from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Id.* ¶ 32.

The FCC simply applied an established principle to a familiar situation. In *APCC*, the case to which the FCC referred, the D.C. Circuit had spoken to the bad-debt issue, agreeing with *intervenor IXCs' observation* that "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties," and citing 47 U.S.C. §§ 206-208. 215 F.3d at 56; see Addendum, *infra*. Sections 206-208 provide a private right of action for any violation of the Act. The court's necessary implication was that

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[12] The FCC has *never* found, as Global Crossing claims at page 4 of its brief, that, "as the 'primary economic beneficiar[ies]' of the practice, the callers 'should bear the burden of paying compensation for these calls.'" Paragraph 86 of the First Order, 11 F.C.C.R. at 20,586, which Global Crossing cites, does not say that callers are the primary economic beneficiaries. The preceding paragraph rejects a proposal under which "payments would not be borne by either the primary economic beneficiary of payphone calls or the cost causer," making it clear that the FCC did not regard "cost causer" and "primary economic beneficiary" as the same thing. *Id.* at 20,587 ¶ 85.

a violation of the FCC's rules violates one or more statutory provisions. See also note 3, *supra*.

Thus, by the time of the *2003 Payphone Order*, precedents established that a violation of FCC rules designed to compensate PSPs violates the Act. It is understandable that the FCC did not include in the order an exegesis on the metaphysical bounds of justness and reasonableness, or a detailed set of criteria to distinguish the regulatory violations that will be deemed unjust or unreasonable from those that fall below such a threshold.[13]

Nevertheless, Global Crossing attempts to pry the FCC's statement out of its context, arguing that "the statement was not the product of sufficient deliberation or explanation to warrant any deference." Pet. Br. 33 (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*)). The suggestion that the statement was "not the product of sufficient deliberation" is simply wrong, as it was made by the full Commission (not some

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[13] The D.C. Circuit responded to the absence of such detailed criteria, in either the Commission's order or the parties' briefs, by asserting that "[a]t the heart of plaintiffs' argument is the notion that it is inherently an unreasonable practice, within the meaning of § 201(b), to violate a Commission regulation." *APCC Services*, 418 F.3d at 1247. That characterization of PSPs' position is not at all accurate. The Code of Federal Regulations is littered with FCC regulations that common carriers could violate without doing anything that in normal parlance would be called an unjust or unreasonable practice. *E.g.*, 47 C.F.R. § 42.6 (retention of toll records); *id.* § 43.11 (reports of local exchange competition data); *id.* § 63.500 (applications to remove trunk lines); *id.* § 64.804 (extending credit to political candidates). What PSPs and the FCC have *actually* argued – in marked contrast to the straw man the D.C. Circuit set up – is that it is unjust or unreasonable to violate the regulations the FCC validly adopted pursuant to a congressional *command* to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones" (47 U.S.C. § 276(b)(1)(A)). If flouting that command by systematically refusing to pay valid debts is just and reasonable – and so plainly just and reasonable that an FCC determination to the contrary fails *Chevron* step two – then it is difficult to conceive of what practices would violate Section 201(b).

subordinate official) after full notice-and-comment proceedings that placed the nature of PSPs' remedies against IXCs squarely at issue. As for the suggestion that the FCC should have more fully explained its reasoning, given the existing precedents, it is unremarkable that it did not do so. Indeed, when placed in context, the presupposition of the FCC's statement – that a carrier's failure to pay just and fair compensation is an unjust or unreasonable practice – is quite clear. This Court has extended *Chevron* deference to a "necessary presupposition" of an agency statement under review, even though that reasoning was not contained in the statement itself. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 420 (1992).

There are at least two further reasons why the brevity of the statement in the *2003 Payphone Order* should not preclude deference to the FCC's interpretation of Section 201(b). *First*, the *Chenery* principle – in which courts are reluctant to accept agency determinations they deem inadequately explained – is applicable to *direct review* of agency decisions, but is not a part of the *Chevron* doctrine as applied in the context of litigation between private parties. *Second*, this Court extends *Chevron* deference not only to formal rulemakings, but also to amicus briefs filed in circumstances where it is clear that they represent the agency's own considered judgment.

i. It is a bedrock principle of administrative law, famously stated in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*), that, when an agency's judgment is based on a determination that the "agency alone is authorized to make," a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency." Accord *Chenery I*, 318 U.S. at 92, 94. But "[t]he *Chenery* case sets forth a rule for courts reviewing administrative decisions." *Building & Construction Trades Department, AFL-CIO* v. *U.S. Department of Labor Wage Appeals Board*, 829 F.2d 1186, 1189 (D.C. Cir. 1987). It is not a part of the *Chevron* deference doctrine. See

ibid. ("The *Chenery* rule, however, does not apply when the question presented is one of statutory construction.").

Had Global Crossing sought review of the *2003 Payphone Order* in a court of appeals under the Hobbs Act, 28 U.S.C. § 158, Global Crossing might have been entitled to the benefit of the *Chenery* principle, and there might have been force to Global Crossing's argument (Pet. Br. 34 n.7) that appellate briefs should be disregarded as *post hoc* rationalizations. Global Crossing, however, did *not* seek such Hobbs Act review. Arguably its current arguments should be disregarded entirely as an impermissible collateral attack on the *2003 Payphone Order*. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970). Even if those arguments are entertained, however, they require application of the *Chevron* doctrine, not the *Chenery* doctrine.

Chevron step two requires deference to any *reasonable* agency policy choice. *Brand X*, 125 S. Ct. at 2702 (citing *Chevron*, 467 U.S. at 845). When a *Chevron* issue arises in private litigation like this case, the Court cannot – as it can on direct review of administrative action – remand to the agency for a better explanation of its action. See, *e.g.*, *Chenery I*, 318 U.S. at 95 (remanding). The agency's interpretation either is reasonable or it is not, and there is no reason – as there might be on direct review – for a court to blind itself to factors that might show the agency's reasonableness just because they are stated in a brief rather than in the agency's own order. Those who find an agency's reasoning too terse may challenge it on direct review, but they may not forgo direct review and then try to achieve the same result (or a better one) by misapplying *Chenery* as if it were a part of the *Chevron* doctrine.[14]

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[14] If paragraph 32 of the *2003 Payphone Order* had been challenged on direct review under the Hobbs Act, acceptance of Global Crossing's *Chenery*

ii. The FCC submitted amicus briefs to the Ninth and D.C. Circuits in which it explained the *2003 Payphone Order* further. In *Auer* v. *Robbins*, 519 U.S. 452 (1997), this Court made clear that, in appropriate circumstances, it will defer to an agency's reasoning set forth in an amicus brief even when that reasoning is not grounded in any more formal statement. The question in assessing agency interpretations offered in briefs is whether there is any "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. In cases to which the *Chenery* doctrine applies, "courts may not accept appellate counsel's *post hoc* rationalizations" for agency action (*Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)), and in all contexts they may not defer to an agency position "urged *only* in the context of [a] litigation" (*Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (emphasis added)). Under each of those formulations, the problem is that the reviewing court has no assurance that the reasoning offered is in fact *the agency's own* considered reasoning, as opposed to a lawyer's reasoning to which the agency itself may not subscribe.

In this case, however, Global Crossing *conceded* before the Ninth Circuit that the reasoning set forth in the FCC's amicus brief was the agency's own. When asked by the court why it should not defer to the FCC's brief under *Auer*, counsel admitted that "[t]he agency would not disavow it – no argument with that, your Honor." Statement at 7:59, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. As in *Auer*, "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and

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argument would have led to a remand for a more complete explanation of the agency's reasoning. Here, by contrast, Global Crossing wants to use the *Chenery* argument – as AT&T and Sprint did in *APCC Services* – to obtain a judicial determination not that the *2003 Payphone Order* is inadequately explained, but that it is an *impermissible* construction of the Act.

considered judgment on the matter in question." 519 U.S. at 462. Indeed, the FCC's briefs merely complement the agency's formal statement in the *2003 Payphone Order*.

B. The FCC's Interpretation of Section 201(b) Is Reasonable

The FCC's Ninth Circuit amicus brief explained that "an IXC's failure to compensate payphone providers for dial-around calls under FCC rules requiring 'fair compensation' of PSPs * * * is an 'unjust and unreasonable' practice within the meaning of § 201(b) 'in connection with' the IXC's provision of 'communications service.'" Brief of FCC as Amicus Curiae, *available at* 2004 WL 2297782 at *10. That conclusion is eminently reasonable.

No party or amicus has come right out and said that a refusal to pay fair compensation in accordance with FCC rules is "just" and "reasonable." Global Crossing, however, soft-pedals an equivalent suggestion by saying that there is "nothing 'unjust or unreasonable'" about it. Pet. Br. 35. This, it claims, is because callers – not IXCs – are the "cost causer[s]" when they place coinless calls from payphones. First Order, 11 F.C.C.R. at 20,585 ¶ 85. Global Crossing reasons that "it is callers who *ought to be* paying payphone service providers for the use of their payphones," and "a carrier's failure to pay a payphone service provider to compensate for the actions of callers is hardly unjust or unreasonable." Pet. Br. 35-36 (emphasis altered).

This argument about what the FCC's regulations "ought to" say misses the point. It is no defense to a regulatory violation to argue that the regulation itself reflects unwise policy judgments. Even if the FCC *could have* assigned to callers the responsibility for compensating PSPs, it exercised its policy discretion to place that responsibility on IXCs instead, and that arrangement was upheld on judicial review. See *APCC*, 215 F.3d at 52. That being so, the time to debate the fairness of an

IXC-pays system is long past – the issue now is *whether the violation of an FCC rule* ordering IXCs to compensate PSPs is an unjust or unreasonable practice.

Even if this Court determined that the FCC's interpretation of Section 201(b) is not entitled to *Chevron* deference, the analysis would not be at an end. Metrophones' core allegation is that Global Crossing's failure to pay compensation was unjust and unreasonable in violation of Section 201(b). With or without *Chevron* deference, that *statutory* assertion must be addressed. In *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001), the Court held that, even when an agency statement does not qualify for *Chevron* deference, courts should nevertheless consider it for its persuasive value under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944) (looking to an agency's care, consistency, formality, relative expertness, and persuasiveness). The FCC not only reached the commonsense conclusion that welching on a debt is unjust or unreasonable – particularly when Congress has expressed concern about the subject in Section 276 – but also did so in the context of a set of interrelated provisions in which the existence of remedies was key to setting the level of payphone compensation and not including a bad-debt component. The FCC relied, moreover, on *IXCs'* judicially accepted arguments that a damages remedy would be available *under Sections 206-208*. The FCC's reasoning should be completely persuasive under *Skidmore*.

II. A Violation Of The FCC Payphone Rules Constitutes A Violation of Section 276, For Which Sections 206-207 Provide A Private Right Of Action

The judgment of the court below is that Metrophones may proceed with its private right of action under Sections 206-207 to collect the amounts withheld by Global Crossing in violation of the payphone regulations. The Ninth Circuit so held because it perceived a violation of the payphone regulations to be a violation of Section 201(b). That holding was correct, but the

judgment may be affirmed on the alternate ground that a violation of the payphone regulations is a violation of Section 276.

The Ninth Circuit's rejection of the Section 276 argument is no impediment to affirmance on the Section 276 ground. See note 4, *supra*. And there is no doubt that the Section 276 argument was preserved below. "[A] claim is preserved if made by the current litigant in the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent." *United States* v. *Vonn*, 535 U.S. 55, 59 n.1 (2002) (internal quotations omitted) (quoting *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992)). Metrophones was a party to *Greene*, where it argued that a violation of the FCC's dial-around compensation rules amounted to a violation of Section 276. The Ninth Circuit relied on *Greene*'s treatment of Section 276 throughout its *Global Crossing* opinion. Pet. App. 6a-7a. Metrophones certainly has never "concede[d] * * * the correctness" of *Greene*. Although it did not explicitly quarrel with that holding in its *Global Crossing* brief – at the time of briefing the panel was powerless to depart from it – Metrophones' counsel twice stated Metrophones' disagreement with *Greene* during oral argument. Statements at 19:35 and 30:00, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287.

What is more, "a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue." *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 440 (1993); *Town of Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1991) (considering issue logically antecedent to those decided by court of appeals). Analysis of Section 276 is logically antecedent to consideration of Section 201(b), because throughout its brief Global Crossing argues that Metrophones is using Section 201(b) as an end run around Congress's supposed *prohibition* in Section 276 of

pursuit of a private damages action. *E.g.*, Pet. Br. 3 ("The issue presented here is whether the Ninth Circuit's decision allows through the back door the sort of cause of action that Congress has barred from coming through the front."); *id.* at 10 ("If section 276 does not require carriers to compensate payphone service providers for coinless calls, then the generalized language of section 201(b) cannot be read as doing so either."); see also Sprint Br. 4 ("the Ninth Circuit inexplicably strayed from the text and structure of § 276 in holding that § 201(b) affords the basis for private enforcement of the payphone regulations through the right of action * * * in §§ 206 and 207").

In reaction to PSPs' inadequate ability to collect compensation under the existing TOCSIA regime, in 1996 Congress ordered the FCC "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A). To accomplish that goal, Congress directed the FCC to "establish a per call compensation plan" for PSPs. *Ibid.* Thus, in Section 276, Congress mandated that PSPs be compensated for all coinless calls, and delegated to the FCC determining how to carry out that mandate.

The FCC decided that IXCs should compensate PSPs for coinless calls, and promulgated rules to that effect. 47 C.F.R. § 64.1300 *et seq.* Global Crossing's violations of those rules, which authoritatively interpret Section 276, give rise to a right of action under Sections 206-207 because "it is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Sandoval*, 532 U.S. at 284.

The Ninth Circuit, however, rejected that reasoning for two reasons. *First*, it held that, although Section 276 "directs the FCC to come up with a plan for compensation, * * * it does not

establish a *right* to compensation," which it interpreted *Sandoval* to require. *Greene*, 340 F.3d at 1050. *Second*, it noted that Section 276 "does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs,'" and therefore held that an IXC's failure to pay does not amount to a violation of Section 276. *Ibid.* That analysis gets *Sandoval* exactly backwards. *Sandoval* requires courts to look for rights-creating language only in the absence of an *express* right of action, which the Communications Act provides in Sections 206-207. What *Sandoval does* establish is that the silence in Section 276 regarding the party responsible for compensating PSPs is unhelpful to Global Crossing's position; because Congress identified a beneficiary of the compensation right it created, but delegated identification of the proper payor to the FCC, it intended that a violation of the FCC's rule be actionable in the same way as a violation of Section 276 itself.

A. Because Sections 206-207 Provide An Express Right Of Action For Any Violation Of The Act, There Is No Need To Look For Rights-Creating Language In Section 276 Itself

When Congress provides an express right of action in a statute, there is no need also to determine whether Congress intended to create a right by implication. *Sandoval*, an *implied*-right-of-action case, in no way alters that regime. There, the question was whether private individuals could sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Section 601 of that Title had previously been held to create an implied private right of action to remedy an employer's *intentional* discrimination, but that section said nothing about conduct that had a disparate impact. 532 U.S. at 280-281. The Court therefore assumed that, at least under Section 601, such conduct was permissible. *Id.* at 281. It also assumed that the regulations themselves were validly issued under Section 602, which allowed agencies to craft rules to "effectuate the provisions of [§ 601]." *Id.* at 282.

The Court in *Sandoval* "d[id] not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section." 532 U.S. at 284. Because the disparate-impact regulations "forbid conduct that § 601 permits," however, the Court reasoned that they "do not simply apply § 601" (*id.* at 285), and thus it was forced to ask whether Section 602 – under which the regulations were issued – provided a right of action of its own independent force. The Court therefore asked whether Section 602 contained an implied right of action, looking to such factors as whether it contained "rights-creating" language. *Id.* at 286-293.

Sandoval looked for rights-creating language in Section 602 only because Title VI did not contain an express right of action. Had such a right been present, the question would have been whether the *scope of the express right* covered a violation of regulations issued under Section 602. *Sandoval* nowhere suggests that, even when an express right exists, it is inoperative unless supplemented with rights-creating language elsewhere; to the contrary, it says that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286. By providing an express remedy in Sections 206-207 of the Communications Act, Congress has made the judicial task easy indeed.

B. The Express Right Of Action In Sections 206-207 For A Carrier's Violation Of The Act Encompasses Violations Of Regulations Authoritatively Interpreting Section 276

In *Sandoval*, before discussing whether Congress had implied a right of action for violations of regulations issued under Section 602, the Court made clear that, had the regulations governed *intentional* discrimination instead of acts with disparate impacts, it "d[id] not doubt" that they would have been "covered by the cause of action to enforce [§ 601]." 532 U.S. at 284.

"Such regulations, if valid and reasonable, authoritatively construe the statute itself, see * * * *Chevron* * * *, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.* That reasoning squarely applies to the FCC's payphone rules: because, as the D.C. Circuit has held (*APCC*, 215 F.3d at 52), the regulations authoritatively interpret Section 276, Congress intended the private cause of action in Sections 206-207 to apply as forcefully to violations of the rules as to violations of Section 276 itself.

Global Crossing offers two reasons why *Sandoval*'s clear statement should not apply to the payphone rules. *First*, it argues that its violations of the payphone rules do not violate Sections 206-207 because those sections provide a right of action only for statutory violations, whereas other provisions of the Act provide rights of action for violations of both statutes and regulations. Pet. Br. 12-19. That argument contradicts *Sandoval* and makes no sense on its own terms – there is no reason to believe that, in providing a right of action for any person injured by a common carrier's "act * * * declared to be unlawful * * * in this chapter" (47 U.S.C. § 206), and crafting Section 276 "to ensure that all payphone service providers are fairly compensated" (47 U.S.C. § 276(b)(1)(A)), Congress would not have intended that violations the regulations effecting its intent be actionable as a violation of Section 276 itself. Congress's purpose in phrasing Section 276 as an express delegation to the FCC – rather than spelling out all details itself – was not to curtail PSPs' rights found elsewhere in the Act. Rather, Congress intended that the FCC devise a reasonable system to *compensate* PSPs, exactly what Global Crossing's position would not do.

Second, Global Crossing argued in the Ninth Circuit – and the court held in *Greene*, 340 F.3d at 1052 – that violations of the payphone rules are not privately actionable because the rules

"go beyond" Section 276, much as the disparate-impact regulations in *Sandoval* "went beyond" intentional discrimination, the conduct forbidden in Section 601 of Title VI. In *Sandoval*, the Court made clear that an agency "can[not] conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." 532 U.S. at 291. Global Crossing notes that Section 276 does not identify the party responsible for compensating PSPs, and suggests that, by filling in the blank left by Congress, the FCC has assumed the role of *Sandoval*'s sorcerer.

That argument proves far too much. The Court said in *Chevron* itself that, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency *to elucidate* a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-844 (emphasis added); see also *Brand X*, 125 S. Ct. at 2699 ("ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion"); STEPHEN BREYER, ACTIVE LIBERTY 105 (2005) ("Legislation inevitably contains ambiguities and gaps. The agency that administers the statute is likely better able than a court to know how best to fill those gaps."). The very nature of elucidation and gap-filling is to provide details that flesh out Congress's general directives. *Id.* at 102-103. That is why, in *Sandoval*, the Court recognized a private right of action to enforce *regulations* dealing with intentional discrimination – because those regulations, promulgated pursuant to a delegation of authority to the agency, "authoritatively construe the statute itself." 532 U.S. at 284.

Because a major purpose of regulations is to provide details statutes do not, determining whether a regulation "goes beyond" a statute for purposes of *Sandoval* requires determining whether the details it provides are within the scope of discretion dele-

gated to the agency – not whether they "go beyond" the statute in the trivial sense of spelling out things the statute itself does not. In *Sandoval*, the statute that supported a private right of action was Section 601, but "the disparate-impact regulations d[id] not simply apply § 601 – since they indeed forbid conduct that § 601 permits." 532 U.S. at 285. *That* is what it means to "go beyond" a statute. Validly specifying details Congress did not itself spell out is the opposite of going beyond a statute.[15]

C. Even Under A *Sandoval* Approach That Looks For Rights-Creating Language, PSPs Would Have A Right Of Action Under Section 276

As explained above, the portion of *Sandoval*'s analysis that asks whether a statute contains rights-creating language is best read to apply only when a statute does not contain an express right of action. Because the Communications Act does contain an express right, no analysis of implied rights is necessary. Nevertheless, both the Ninth Circuit in *Greene*, 340 F.3d at 1051, and the D.C. Circuit in *APCC Services*, 418 F.3d at 1246, held it to be fatal to the PSPs' arguments that Section 276 sup-

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[15] Lower courts other than the Ninth and D.C. Circuits have understood that, when a statute sets forth a specific mandate and instructs an agency to fill in the details of how that mandate will be achieved, *Alexander* v. *Sandoval* is authority for enforcement of the resulting regulations through a private cause of action. *E.g.*, *Iverson* v. *City of Boston*, 452 F.3d 94, ___, 2006 WL 1789114, at *5 (1st Cir. June 30, 2006) ("a regulation that simply effectuates an express mandate contained in the organic statute may nonetheless be enforceable through the private right of action"); *Ability Center* v. *City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) (holding that a regulation is privately enforceable because it "imposes requirements specifically envisioned by the statute," which orders the Attorney General to adopt regulations to meet certain statutory goals); *Chaffin* v. *Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2003) (a private right of action is available because "[t]he regulations simply provide the details necessary to implement the statutory right").

posedly contains no "rights-creating language." That conclusion is utterly wrong.

Section 276 was expressly enacted for the benefit of PSPs. Under the TOCSIA regime, which existed before 1996, PSPs had inadequate compensation for dial-around calls. Section 276(b)(1)(A), which is expressly intended "to ensure that payphone service providers are fairly compensated," is Congress's reaction to that problem. The Ninth Circuit in *Greene* disagreed, stating that *the* purpose of Section 276 is instead to "'promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.'" 340 F.3d at 1052.

That is a false dichotomy: statutes can have more than one purpose. It is *typical* for statutes that create individual, judicially enforceable rights to do so *for a public purpose*. *E.g.*, 42 U.S.C. § 12101(a)(9) (Americans with Disabilities Act was passed in part because discrimination against the disabled "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"). If the *presence* of a purpose to benefit the public implied the *absence* of a purpose to create individually enforceable rights, then only crass special-interest legislation could ever contain "rights-creating language." The noble fact that a statute, *by creating individual rights*, serves the public interest is hardly a reason to pretend that it *only* protects the public interest and does not create individual rights. But see Sprint Br. 3 (claiming that "Section 276 was not enacted for the benefit of PSPs but rather * * * to the benefit of the general public"). Here, as the FCC correctly determined in 1999, the relevant statute serves *three* purposes: "Section 276 directs us to promulgate regulations that will achieve three basic policy objectives with respect to the provision of payphone services: (1) promoting a competitive payphone market; (2) ensuring the widespread deployment of payphones for the benefit of the general public; and (3) ensuring that providers of payphone services receive fair compensation

for every call made using their payphones." 1999 Order, 14 F.C.C.R. at 2547 ¶ 1.

Section 276(b)(1)(A) is phrased in terms of ensuring that PSPs are compensated, rather than ordering IXCs to pay compensation. A statute "with an unmistakable focus on the benefited class" is precisely the type that supports a right of action for that class. *Gonzaga University* v. *Doe*, 536 U.S. 273, 287 (2002) (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 691 (1979)); see also 536 U.S. at 284. In contrast, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)). Global Crossing's observation (Pet. Br. 23 & n.4) that Section 276 does not direct IXCs to compensate PSPs thus militates *in favor* of a private right of action for PSPs.

The fact that Section 276 orders *the FCC* to establish a plan ensuring that PSPs are compensated does not alter the conclusion that it is focused on protecting PSPs' rights. In *Sandoval*, the Court noted cases in which it has found no private right of action under statutes that focus "on the agencies that will do the regulating." 532 U.S. at 289. The statutes in those cases, however, were focused *exclusively* on the regulating agency. In *Sandoval*, for example, Section 602 directed the agencies "to effectuate the provisions of [§ 601] * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. That statute says nothing whatever about the rights of individuals. Similarly, in *Universities Research Ass'n, Inc.* v. *Coutu*, 450 U.S. 754 (1981), the statute provided in relevant part that advertised specifications for federal contracts "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." That language simply instructs the agency to include certain language in its contracts; unlike Section 276(b)(1)(A), it does nothing "to ensure" anyone's rights.

In contrast to statutes directed solely to an agency without reference to the person benefited, when a statute instructs that someone take action for the clear benefit of a particular person, this Court has held that a right of action exists for the benefited person. See, *e.g.*, *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 544 (1937) (holding that right of action for representative existed under the Railway Labor Act where statute instructed that "the carrier shall treat with the representative so certified"). That is precisely the situation under Section 276(b)(1)(A): although it directs the FCC to craft a plan to ensure that PSPs are compensated, it is phrased that way only to make clear the extent and purpose of the FCC's delegated authority. It says, in effect, that PSPs shall be compensated for each and every coinless call, through a plan that the FCC shall design to ensure that outcome. Congress enacted the statute to ensure compensation, not just to ensure the existence of a plan.

Section 276(b)(1)(A) speaks in the imperative language of entitlement, not mere preference: "the Commission *shall* take *all actions necessary* * * * to prescribe regulations that * * * establish a per call compensation plan to *ensure* that *all* payphone service providers are fairly compensated for *each and every* completed intrastate and interstate call" (emphasis added). Unlike TOCSIA, which delegated discretion to the FCC to "consider" whether compensation was needed, Section 276 expresses an unambiguous congressional determination that *all* PSPs *must* be compensated, and for *every* completed call. This is the exact opposite of "an 'aggregate' focus," which Chief Justice Rehnquist's opinion for the Court in *Gonzaga* explained is characteristic of statutes that do *not* contain rights-creating language. 536 U.S. at 288 (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 343 (1997)).

An "individualized, concrete monetary entitlement" is the kind of rights-creating language that will support even an implied right of action and an action under 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 288 n.6 (citing *Maine* v. *Thiboutot*, 448

U.S. 1 (1980); *Wright* v. *Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987); and *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990)). An entitlement on the part of "all" PSPs to an agency-devised "plan" that will "ensure" fair compensation for "each and every" call meets even that high standard. For the Ninth and D.C. Circuits to deny enforcement of Section 276 under the Communications Act's *express* private right of action, on the ground that Section 276 contains no "rights-creating language," was simply wrong.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1114
and consolidated cases

AMERICAN PUBLIC COMMUNICATIONS COUNCIL, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

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JOINT BRIEF OF LONG DISTANCE, PAGING AND CONSUMER INTERVENORS IN SUPPORT OF RESPONDENTS

STATUTES AND REGULATIONS

Sections 206-08 and 501-03 of the Communications Act of 1934, as amended (47 U.S.C. §§206-08, 501-03) are reproduced in the Statutory Addendum attached to this brief as Appendix A. In addition, Section 276 of the Communications Act of 1934, as amended (47 U.S.C. §276), and its implementing regulation, 47 C.F.R. §64.1300, are [2] reproduced in the Statutory Addendum to the Joint Brief of Petitioners MCI WORLDCOM, Inc. and Sprint Corporation, and Supporting Intervenors.

INTRODUCTION

The intervenors joining in this brief include long distance carriers, providers of paging services and other companies that make extensive use of toll-free (800) services in their business operations. These intervenors are entities that bear, directly or indirectly, the burden of paying compensation for coinless calls that is at issue in this proceeding. All of these intervenors joined in the Joint Brief of Petitioners MCI WORLDCOM, Inc. and Sprint Corporation,[1] and Supporting Intervenors (hereinafter "Brief of MCI WORLDCOM et al."), arguing that the per-call rate set by the FCC is plainly excessive in relation to the actual costs and call volumes of an efficient payphone service provider (PSP). At the same time, these intervenors support, in part, the FCC actions challenged by the PSP Petitioners.

* * * [3] * * * However, the PSPs claim that the rate set by the FCC is unreasonably low on three grounds: (1) the FCC erred in failing to require compensation for coinless

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[1] Sprint is both a petitioner and an intervenor. * * *

calls to include the capital costs of the coin mechanism; (2) the FCC erred in failing to include an allowance for bad debt and collection costs; and (3) the FCC miscalculated the number of calls made from a so-called "marginal" payphone. The Long Distance, Paging and Consumer Intervenors support the FCC on the first two issues. * * *

COUNTERSTATEMENT OF THE CASE

A. Exclusion Of The Costs Of The Coin Mechanism

* * *

[5] * * *

B. Bad Debt and Collection Costs

In the Third Order, the FCC declined to include in the per-call rate an allowance for bad debt and collection costs. Although the PSPs had sought reconsideration of the FCC"s earlier finding that there was insufficient information on the record to account for the costs relating to bad debt (see Third Order, ¶160 * * *), AT&T and Sprint argued that bad debt and collection costs will decrease as per-call compensation is instituted and that some of the alleged uncollectibles are actually legitimate billing disputes that arose during the earlier interim period, a period in which payment obligations remained unsettled. Id., ¶161 * * *.

The FCC concluded that thee PSPs' recent collection history is "not an accurate guide for future levels of bad debt." Id., ¶162 * * *. The FCC noted that it had no information on how much of the alleged uncollected per-call com-

pensation was due to billing errors of the PSPs, as opposed to carriers refusing to pay their alleged obligations. Id. The FCC also took note of an ex parte request by the RBOC Coalition to clarify the Commission's rules regarding which entities are required to pay compensation and pointed out that if such clarification were granted, "uncollectibles would be significantly reduced." Id. The FCC also found that if it built a bad debt allowance into the rate and [6] PSPs ultimately recovered their uncollectibles from delinquent carriers, a double recovery would result. For all of these reasons, the FCC found "that it would be unwise to establish a cost element for bad debt at this time." Id. * * *

* * *

SUMMARY OF ARGUMENT

* * * [7]

* * * The FCC also reasonably declined to include an allowance for bad debt and collection costs in the compensation rate. The FCC had good reason to be skeptical of the PSPs' claimed bad debt costs, since the PSPs, by their own admission, have no way of accurately counting the number of compensable calls. Moreover, unlike an ordinary commercial transaction, here the "purchasers" of service – long distance carriers – are directly under the FCC's jurisdiction and are compelled to compensate the PSPs by FCC rule. Accordingly, once the initial implementation problems of per-call compensation are worked out, it would be reasonable to expect the PSPs to experience virtually no bad debt. As for collection costs, the functions a PSP must perform to collect compensation are de minimis in nature, and thus the FCC properly refused to accept the PSPs' inflated estimates of these costs as well.

[8] **ARGUMENT**

* * * [13] * * *

II. THE FCC DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DECLINING TO INCLUDE ALLOWANCES FOR BAD DEBT AND COLLECTION COSTS IN THE COINLESS CALL RATE

In the Third Order, the FCC declined to include allowances for bad debt and collection costs in the per-call rate because the FCC found the PSPs' data supporting their claims were inaccurate and unreliable. Third Order, ¶¶162-164 * * *. The Long Distance, Paging and Consumer Intervenors support the FCC's response to the PSPs (FCC Br. at 47-49) but wish to supplement that discussion in just a few respects.

* * *

Second, although it may be reasonable, in ordinary commercial transactions, to build an allowance for uncollectibles into the prices for a firm's goods and services, the coinless call compensation here at issue is not ordinary. The duty to pay compensation [14] arises not from a voluntarily-entered contractual or tariff relationship, but rather from a mandatory FCC rule. Failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§206-08, 501-03. The carriers' implementation of per-call compensation was complicated by the fact that the FCC made several changes – sometimes at the last minute – in the ground rules for tracking compensable calls. * * * However, once the process has matured, one would expect full compli-

ance by the FCC's regulatees with its orders and rules, and thus a near-100% collection rate by PSPs. * * * If PSPs do not bother attempting to collect from some IXCs, other IXCs should not be burdened with the costs of the PSPs' election. * * *

* * * [16] * * *

CONCLUSION

The PSPs' petitions for review should be denied for the reasons discussed above.

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